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d/b/a Tommy Hilfiger

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES NELSON, on behalf of himself
and of all others similarly situated,

Plaintiffs,

vs.

PVH CORP., A California Corporation,
D/B/A Tommy Hilfiger, and DOES 1 to
10,

Defendants.

CASE NO. 8:15-cv-00512-AG-RNB

**ANSWER TO COMPLAINT FOR
DAMAGES**

Trial Date: None Set

Responding Party PVH Corp. ("Defendant"), erroneously named in this lawsuit as PVH Corp., A California Corporation, D/B/A/ Tommy Hilfiger, responds to the First Amended Complaint for Damages Pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., ("Complaint") filed by Plaintiff James Nelson ("Plaintiff"), as follows:

1. Defendant admits that it owns and operates subsidiaries engaged in retail apparel sales throughout the United States and, in so doing, its subsidiaries engage in marketing campaigns through various media, including through mobile marketing. Defendant denies the remaining allegations in Paragraph 1 of Plaintiff's Complaint.

2. The prohibitions of the TCPA and its related regulations are legal

1 conclusions that do not require an admission or denial. Defendant refers all matters
2 of law to the court. The provisions of the TCPA and its related regulations speak for
3 themselves.

4 3. The mandates of the TCPA and its related regulations are legal
5 conclusions that do not require an admission or denial. Defendant refers all matters
6 of law to the court. The provisions of the TCPA and its related regulations speak for
7 themselves.

8 4. The provisions of the TCPA and its related regulations speak for
9 themselves.

10 5. Defendant admits that the 2012 TCPA Order was released to the public
11 by the FCC. Defendant lacks sufficient factual basis to admit or deny the remaining
12 allegations set forth in Paragraph 5 of Plaintiff's Complaint and therefore denies the
13 same.

14 6. The requirements of the 2012 TCPA Order and its related regulations
15 are legal conclusions that do not require an admission or denial. Defendant refers all
16 matters of law to the court. The provisions of the TCPA and its related regulations
17 speak for themselves. The 2012 TCPA Order speaks for itself.

18 7. Defendant admits that the effective date of the 2012 TCPA Order was
19 October 16, 2013. The publication known as the Federal Register speaks for itself.

20 8. The 2012 TCPA Order speaks for itself.

21 9. Denied.

22 10. Denied.

23 11. Defendant denies having sent text messages without having obtained
24 prior express consent, and denies having caused any consumers actual harm as a
25 result of any text messages sent. Defendant lacks sufficient factual basis to admit or
26 deny the remaining allegations set forth in Paragraph 11 of Plaintiff's Complaint and
27 therefore denies the same.

28 12. Defendant admits that Plaintiff has purported to bring this suit under

1 the TCPA on behalf of himself and a putative class of similarly situated persons, and
 2 seeks statutory damages, costs and attorneys' fees. Defendant denies any remaining
 3 allegations contained in Paragraph 12 of Plaintiff's Complaint.

4 13. Whether the Court has jurisdiction is a legal conclusion that does not
 5 require an admission or denial. Defendant refers all matters of law to the court.

6 14. Defendant admits that it is engaged in business in this District. Whether
 7 venue is proper in this district is a legal conclusion that does not require an
 8 admission or denial. Defendant refers all matters of law to the court. Defendant
 9 lacks sufficient factual basis to admit or deny the remaining allegations set forth in
 10 Paragraph 14 of Plaintiff's Complaint and therefore denies the same.

11 15. Defendant lacks sufficient factual basis to admit or deny the allegations
 12 set forth in Paragraph 15 of Plaintiff's Complaint and therefore denies the same.

13 16. Defendant denies that it is a California Corporation, but admits that its
 14 principal place of business is in New York.

15 17. Admitted.

16 18. Defendant lacks sufficient factual basis to admit or deny the allegations
 17 set forth in Paragraph 18 of Plaintiff's Complaint and therefore denies the same.

18 19. Defendant lacks sufficient factual basis to admit or deny the allegations
 19 set forth in Paragraph 19 of Plaintiff's Complaint and therefore denies the same.

20 20. Defendant lacks sufficient factual basis to admit or deny the allegations
 21 set forth in Paragraph 20 of Plaintiff's Complaint and therefore denies the same.

22 21. Defendant lacks sufficient factual basis to admit or deny the allegations
 23 set forth in Paragraph 21 of Plaintiff's Complaint and therefore denies the same.

24 22. Defendant denies that it uses automated computer equipment to send
 25 bulk SMS text messages to cellular telephone subscribers. Defendant lacks
 26 sufficient factual basis to admit or deny the remaining allegations set forth in
 27 Paragraph 22 of Plaintiff's Complaint and therefore denies the same.

28 23. Defendant lacks sufficient factual basis to admit or deny the allegations

1 set forth in Paragraph 23 of Plaintiff's Complaint and therefore denies the same.

2 24. Defendant denies having sent unsolicited or illegal text messages and
3 denies having caused consumers any kind of actual harm. Defendant lacks sufficient
4 factual basis to admit or deny the remaining allegations set forth in Paragraph 24 of
5 Plaintiff's Complaint and therefore denies the same.

6 25. The requirements of the TCPA and its related regulations are legal
7 conclusions that do not require an admission or denial. Defendant refers all matters
8 of law to the court. The provisions of the TCPA and its related regulations speak for
9 themselves. Defendant admits to sending text messages to participants of its mobile
10 marketing program but denies the remaining allegations set forth in Paragraph 25 of
11 Plaintiff's Complaint.

12 26. Defendant admits that a text message of the substance alleged in
13 Paragraph 26 was sent to participants of its mobile marketing program that
14 requested to participate by sending a text message to a designated short code.
15 Defendant lacks sufficient factual basis to admit or deny the remaining allegations
16 set forth in Paragraph 26 of Plaintiff's Complaint and therefore denies the same.

17 27. Defendant admits that a text message of the substance alleged in
18 Paragraph 27 was sent to participants of its mobile marketing program. Defendant
19 lacks sufficient factual basis to admit or deny the remaining allegations set forth in
20 Paragraph 27 of Plaintiff's Complaint and therefore denies the same.

21 28. Defendant admits that a text message of the substance alleged in
22 Paragraph 28 was sent to participants of its mobile marketing program. Defendant
23 lacks sufficient factual basis to admit or deny the remaining allegations set forth in
24 Paragraph 28 of Plaintiff's Complaint and therefore denies the same.

25 29. Defendant admits that a text message of the substance alleged in
26 Paragraph 29 was sent to participants of its mobile marketing program. Defendant
27 lacks sufficient factual basis to admit or deny the remaining allegations set forth in
28 Paragraph 29 of Plaintiff's Complaint and therefore denies the same.

1 30. Defendant admits that a text message of the substance alleged in
2 Paragraph 30 was sent to participants of its mobile marketing program. Defendant
3 lacks sufficient factual basis to admit or deny the remaining allegations set forth in
4 Paragraph 30 of Plaintiff's Complaint and therefore denies the same.

5 31. Defendant admits that a text message of the substance alleged in
6 Paragraph 31 was sent to participants of its mobile marketing program. Defendant
7 lacks sufficient factual basis to admit or deny the remaining allegations set forth in
8 Paragraph 31 of Plaintiff's Complaint and therefore denies the same.

9 32. Defendant admits that a text message of the substance alleged in
10 Paragraph 32 was sent to participants of its mobile marketing program. Defendant
11 lacks sufficient factual basis to admit or deny the remaining allegations set forth in
12 Paragraph 32 of Plaintiff's Complaint and therefore denies the same.

13 33. Defendant admits that text messages to participants of its mobile
14 marketing program were sent using short code 289784 but denies the remaining
15 allegations set forth in Paragraph 33 of Plaintiff's Complaint.

16 34. Defendant lacks sufficient factual basis to admit or deny the allegations
17 set forth in Paragraph 34 of Plaintiff's Complaint and therefore denies the same.

18 35. Denied.

19 36. Defendant lacks sufficient factual basis to admit or deny the allegations
20 set forth in Paragraph 36 of Plaintiff's Complaint and therefore denies the same.

21 37. Defendant lacks sufficient factual basis to admit or deny the allegations
22 set forth in Paragraph 37 of Plaintiff's Complaint and therefore denies the same.

23 38. Defendant admits that the text messages alleged in Plaintiff's complaint
24 were not sent for emergency purposes. Defendant denies the remaining allegations
25 set forth in Paragraph 38 of Plaintiff's Complaint.

26 39. Whether equipment constitutes an ATDS as defined by the TCPA is a
27 legal conclusion that does not require an admission or denial. Defendant refers all
28 matters of law to the court. Defendant denies the remaining allegations set forth in

1 Paragraph 39 of Plaintiff's Complaint.

2 40. Whether equipment constitutes an ATDS as defined by the TCPA is a
3 legal conclusion that does not require an admission or denial. Defendant refers all
4 matters of law to the court. Defendant lacks sufficient factual basis to admit or deny
5 the allegations set forth in Paragraph 40 of Plaintiff's Complaint and therefore
6 denies the same.

7 41. Whether equipment constitutes an ATDS as defined by the TCPA is a
8 legal conclusion that does not require an admission or denial. Defendant refers all
9 matters of law to the court. Defendant lacks sufficient factual basis to admit or deny
10 the allegations set forth in Paragraph 41 of Plaintiff's Complaint and therefore
11 denies the same.

12 42. Whether a text message constitutes an artificial or prerecorded voice
13 call as defined by the TCPA is a legal conclusion that does not require an admission
14 or denial. Defendant refers all matters of law to the court.

15 43. Whether equipment constitutes an ATDS as defined by the TCPA is a
16 legal conclusion that does not require an admission or denial. Defendant refers all
17 matters of law to the court. Defendant denies that it sent any text messages without
18 obtaining consent from those to whom it sent text messages. Defendant lacks
19 sufficient factual basis to admit or deny the allegations set forth in Paragraph 43 of
20 Plaintiff's Complaint and therefore denies the same.

21 44. Denied.

22 45. Denied.

23 46. Defendant admits that data and information reflecting requests to
24 participate in its mobile marketing program are collected and recorded, but denies
25 the remaining allegations in paragraph 46 of Plaintiff's Complaint.

26 47. Defendant admits that Plaintiff purports to have brought this action on
27 his behalf and on behalf of all others similarly situated. Defendant denies the
28 remaining allegations set forth in Paragraph 47 of Plaintiff's Complaint.

48. Whether a putative class satisfies the numerosity requirement of Rule 23 of the Federal Rules of Civil Procedure is a legal conclusion that does not require an admission or denial. Defendant refers all matters of law to the court. Defendant denies the remaining allegations set forth in Paragraph 48 of Plaintiff's Complaint.

49. Whether a putative class satisfies the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure is a legal conclusion that does not require an admission or denial. Defendant refers all matters of law to the court. Defendant denies the remaining allegations set forth in Paragraph 49 of Plaintiff's Complaint.

50. Whether a putative class satisfies the typicality requirement of Rule 23 of the Federal Rules of Civil Procedure is a legal conclusion that does not require an admission or denial. Defendant refers all matters of law to the court. Defendant denies the remaining allegations set forth in Paragraph 50 of Plaintiff's Complaint.

51. Whether a putative class satisfies the adequacy requirement of Rule 23 of the Federal Rules of Civil Procedure is a legal conclusion that does not require an admission or denial. Defendant refers all matters of law to the court. Defendant denies the remaining allegations set forth in Paragraph 51 of Plaintiff's Complaint.

52. Whether a class is ascertainable as set forth in Rule 23 of the Federal Rules of Civil Procedure is a legal conclusion that does not require an admission or denial. Defendant refers all matters of law to the court. Defendant denies the remaining allegations set forth in Paragraph 52 of Plaintiff's Complaint.

53. Whether a case can be brought and maintained as a class action under Rule 23(b)(1) or Rule 23(b)(3) of the Federal Rules of Civil Procedure is a legal conclusion that does not require an admission or denial. Defendant refers all matters of law to the court. Defendant denies the remaining allegations set forth in Paragraph 53 of Plaintiff's Complaint.

FIRST CAUSE OF ACTION

54. Defendant incorporates by reference all of the above responses to Plaintiff's Complaint as though fully stated herein.

1 55. The acts made unlawful by the TCPA is a legal conclusions that does
2 not require an admission or denial. Defendant refers all matters of law to the court.
3 The provisions of the TCPA speak for themselves.

4 56. The acts made unlawful by the TCPA and its related regulations is a
5 legal conclusion that does not require an admission or denial. Defendant refers all
6 matters of law to the court. The provisions of the TCPA and its related regulations
7 speak for themselves.

8 57. Whether equipment constitutes an “automatic telephone dialing
9 system” as defined by the TCPA is a legal conclusion that does not require an
10 admission or denial. Defendant refers all matters of law to the court. Defendant
11 denies the remaining allegations set forth in Paragraph 57 of Plaintiff’s complaint.

12 58. Defendant lacks sufficient factual basis to admit or deny the capacity of
13 the equipment used to send the text messages alleged in Plaintiff’s Complaint and
14 therefore denies the same. Defendant denies the remaining allegations set forth in
15 Paragraph 58 of Plaintiff’s Complaint.

16 59. Defendant lacks sufficient factual basis to admit or deny the capacity of
17 the equipment used to send the text messages alleged in Plaintiff’s Complaint and
18 therefore denies the same. Defendant denies the remaining allegations set forth in
19 Paragraph 59 of Plaintiff’s Complaint.

20 60. Defendant admits that text messages were sent to participants in its
21 mobile marketing program, but lacks sufficient factual basis to admit or deny the
22 capacity of the equipment used to send the text messages and therefore denies the
23 same. Defendant denies the remaining allegations set forth in Paragraph 60 of
24 Plaintiff’s complaint.

25 61. Whether a text message constitutes “an artificial or prerecorded voice”
26 within the meaning of the TCPA is a legal conclusion that does not require an
27 admission or denial. Defendant refers all matters of law to the court. Defendant
28 lacks sufficient factual basis to admit or deny the allegations set forth in Paragraph

61 of Plaintiff's Complaint and therefore denies the same.

62. Denied.

63. Denied.

DEFENDANT'S DEFENSES

FIRST DEFENSE (Failure to State a Claim)

As a first defense, Defendant alleges that Plaintiff's Complaint, and each and every cause of action therein, fails to state a claim upon which relief can be granted.

SECOND DEFENSE (Consent)

As a second defense, Defendant alleges that Plaintiff consented to and/or invited the conduct from which he seeks relief.

THIRD DEFENSE (Estoppel)

As a third defense, Defendant alleges that Plaintiff is estopped from recovering damages from Defendant by his own conduct.

FOURTH DEFENSE (Unclean Hands)

As a fourth defense, Defendant alleges that Plaintiff's Complaint, in whole or in part, is barred by the principle of unclean hands.

FIFTH DEFENSE (Failure to Mitigate)

As a fifth defense, Defendant alleges that any and all damages sustained by Plaintiff, if any, are the direct and proximate cause of Plaintiff's failure to mitigate his damages.

SIXTH DEFENSE (Due Diligence)

As a sixth defense, Defendant states that it has exercised due diligence and

1 relied in good faith on the representations of others, and is not aware of and had no
2 way of becoming aware of any alleged wrongdoing or omissions.

3
4 **SEVENTH DEFENSE**
(Avoidance)

5 As a seventh defense, Defendant alleges that Plaintiff failed to take
6 precautions that would have avoided and/or diminished his injuries and damages, if
7 any.

8
9 **EIGHTH DEFENSE**
(Excessive Fines)

10 As an eighth defense, Defendant alleges that the award of statutory penalties
11 against Defendant would violate the prohibition against excessive fines of the
12 United States Constitution.

13
14 **NINTH DEFENSE**
(Statutory and Regulatory Compliance)

15 As a ninth defense, Defendant states that, at all times, it has complied with all
16 requirements under relevant statutes and regulations.

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18 **TENTH DEFENSE**
(Ratification)

19 As a tenth defense, Defendant states that Plaintiff and/or putative class
20 members ratified any conduct allegedly engaged in by Defendant giving rise to this
21 Complaint.

22
23 **ELEVENTH DEFENSE**
(Reservation of Rights)

24 As an eleventh defense, Defendant states that it currently has insufficient
25 information upon which to form a belief as to whether it has additional defenses
26 available. Defendant reserves its right to assert additional defenses in the event
27 investigation and discovery indicate such additional defenses would be appropriate.
28

1 WHEREFORE, Defendant respectfully request:

2 1. A judgment in favor of Defendant, and against Plaintiff, and that
3 Plaintiff take nothing by reason of this Complaint; and

4 2. That the Court award Defendant its cost of suit herein and such other
5 further relief as the Court deems just.

6
7 DATED: September 1, 2015

LEWIS BRISBOIS BISGAARD & SMITH LLP

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By: /s/ Greg L. Johnson

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Greg L. Johnson

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Timothy J. Nally

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Attorneys for Defendant PVH CORP. d/b/a

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Tommy Hilfiger

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